What Legal Challenges Will Await the OSHA Vaccine Emergency Temporary Standard?

Insights
10.13.21

As part of his administration's plan to combat the COVID-19 pandemic, President Joe Biden recently announced a "six-pronged, comprehensive national strategy" to use every tool at his disposal to enforce vaccine and testing requirements. The centerpiece of this strategy: an impending Emergency Temporary Standard (ETS) from the Occupational Safety and Health Administration (OSHA) that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any unvaccinated workers to be tested weekly. Even with the specifics of the ETS likely to be announced soon, even larger questions remain: what legal challenges will await the ETS – and will they succeed?

What Is an ETS?

To properly understand the soon-to-be-launched legal challenges, you first need some background on the ETS itself. The Occupational Safety and Health Act of 1970 (the OSH Act) allows the Secretary of Labor, after public notice and opportunity for comment by interested persons, to promulgate rules and standards for workplace safety. But the Act also allows the Secretary to bypass these normal procedures in favor of promulgating an emergency rule.

Such an ETS can take effect immediately upon publication in the Federal Register – without a typical notice-and-comment period – if the Secretary determines that "employees are exposed to ***grave danger*** from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and that "emergency" action is necessary "to protect employees from such danger." This statute further provides that any ETS published shall only serve as a proposed (i.e., "temporary") rule, and that the Secretary shall act to promulgate this rule as a standard regulation no later than six months after publication.

The OSHA-State-Plan Issue

As we have written about previously, the ETS will take immediate effect in the 29 states where federal OSHA has jurisdiction once it is published in the Federal Register. However, the OSH Act authorizes states to establish their own occupational safety and health plans which are approved by OSHA if those standards are "at least as effective" as the OSHA standards. These remaining states (including, for example, California, Tennessee, North Carolina, and Kentucky) will have 15 to 30 days to either adopt the ETS or to adopt their own standards that are at least as effective.

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

Unlike those with federal OSHA plans, OSHA-state-plan states must also cover state and local government entities not covered by OSHA, such as public schools. Kentucky OSH standards, for example, consist of state-specific standards unique to Kentucky, OSHA standards incorporated with state-specific provisions, and OSHA standards incorporated without change. However, Kentucky and several other state-plan-states have recently adopted legislation restricting state agencies' ability to adopt standards stricter than federal OSHA standards. So, what will these states potentially do?

They essentially have four options:

- Adopt the ETS;
- Adopt standards even stricter than the ETS, such as including all employers at some level below the 100-employee minimum threshold (for an example of this in action, look to Cal/OSHA's standards that took effect in November 2020);
- Refuse to adopt the ETS, which is a dangerous move in that it risks OSHA revoking approval of an entire State Plan (which will deter most, if not all, OSHA-state-plan states from opting for outright refusal); or
- Challenge the ETS in court. Section 7(f) of the OSH Act allows any person "adversely affected" by a standard to file a petition challenging that standard in federal appeals court within 60 days (including a request for injunctive relief blocking the ETS from taking effect).

As noted below, a collection of state Attorneys General have already indicated their intent to challenge the ETS, providing them a myriad of federal appeals court venues in which to launch their attack. Traditionally, the scope of any injunctive relief sought by the Attorneys General would be limited to requesting that the rule be blocked as it applies their own citizens only. However, given corporate citizens' operations across state lines and liberal states' reluctance to challenge the ETS, the immediate relief sought by the Attorneys General will almost certainly be a nationwide injunction against the ETS.

Interestingly, this kind of "non-party injunctive relief" would place the Biden administration in the same position as the Trump administration in arguing the limitations of judicial authority on nationwide executive action. Whether or not a preliminary injunction is entered against the ETS, the aim for the Attorneys General would be for a Circuit Court to vacate and remand the ETS, eliminating it altogether, as has been done before. That could lead to the endgame of a trip to the U.S. Supreme Court, which often hesitates to get involved in what may be considered to be a "political" dispute – and therefore may turn down the chance to weigh in on such a case.

What Challenging an ETS Looks Like

Historically, OSHA has only used the ETS process a total of nine times. Of those nine standards, six were challenged, resulting in only one standard fully withstanding scrutiny.

Only Successful ETS to Withstand Legal Challenge Involved Cancer Concerns

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

Only Successful ETS to Withstand Legal Challenge Involved Cancer Concerns

The only ETS to have survived a legal challenge came about in 1978 when OSHA's emergency rule aimed at protecting workers from vinyl cyanide – a chemical used in rubber manufacturing – was allowed to take effect despite objections from industry groups. The Sixth Circuit Court of Appeals found in *Vistron Corp. v. OSHA* that the ETS barring use of the chemical came after not only a year-long study on lab rats but also another study demonstrating a higher incidence of cancer cases among workers exposed to it in South Carolina.

Best Legal Framework for Analyzing ETS Standard

Although the ETS at issue in 1974's *Florida Peach Growers Association, Inc. v. United States Department of Labor* was struck down, the case presents the best framework for analysis that will likely be followed in the upcoming legal challenge. In that case, several organizations representing farmworkers and food growers filed suit to set aside a 1973 ETS designed to protect against exposure to pesticide residue on foliage. The food growers sought to have the standard thrown out for lacking a "grave danger" to workers, and Fifth Circuit Court explained that the OSH Act gave the Secretary of Labor "extraordinary power." As such, the Court said, this power "should be delicately exercised, and only in those emergency situations which require it."

According to the Court, any ETS should balance the emergency protections against their "effect upon economic and market conditions in the industry." In that case, while the Fifth Circuit acknowledged that there was "substantial evidence" that the farmworkers exposed to the pesticide residue "may experience headache, fatigue, and vertigo," those issues did not rise to the level of a "grave danger." Instead, a "grave danger" necessitating an emergency measure should refer to "the danger of incurable, permanent, or fatal consequences to workers," not "easily curable and fleeting effects on workers' health…." Failing that, an ETS will not withstand judicial scrutiny.

What Level of Certainty is Required?

The Third Circuit confronted a similar issue regarding what constitutes a "grave danger" in *Dry Color Manufacturers Association, Inc. v. Department of Labor*. There, OSHA promulgated an ETS related to chemicals it argued were carcinogenic. When two of those listed chemicals were challenged by manufacturers working with those chemicals, OSHA pointed to studies showing that the chemicals caused cancer in rodents. The Third Circuit did not find an extrapolation from rodent experiments to humans as meeting the requirements of the Act. In vacating the ETS for those two chemicals, the Third Circuit observed that, "while the Act does not require an absolute certainty as to the deleterious effect of a substance on man, an emergency temporary standard must be supported by evidence that shows *more* than some possibility that a substance may cause cancer in man."

Time Limitations Could Be an Issue

Circuit Courts have also been asked to consider harm that may accrue outside of the six-month period prescribed in the ETS statutes. In *Asbestos Information Association/North America v. OSHA*

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

period prescribed in the ETS statutes. In *Asbestos Information Association/North America v. OSHA*, the Fifth Circuit declined to do so, noting that OSHA was to promulgate a permanent standard within the six-month period. "The ETS statute does not contemplate the Secretary's allowing an ETS to lapse before he promulgates a permanent standard," the Court concluded. Even if an ETS did lapse, it said there is no guarantee that employers would not revert back to "less exacting standards." The Fifth Circuit went on to explain that OSHA "cannot use its ETS powers as a stop-gap measure." Not only that, OSHA's "failure to act may be evidence that a situation is not a true emergency," even if it may not conclusively establish that fact. Finally, "even if adequately explained, an ETS must, on balance, produce a benefit the costs of which are not unreasonable. The protection afforded to workers should outweigh the economic consequences to the regulated industry."

What Has OSHA Said About the Vaccine ETS?

OSHA has telegraphed a framework for the justification it will use with the impending vaccine ETS when it issued an emergency COVID-19 rule only applicable to the healthcare industry in June 2021. OSHA's healthcare ETS was accompanied by a preamble of more than 200 pages, much of which was devoted to the grave danger posed by COVID-19 and the general need for the ETS.

OSHA argued that the dangers from COVID-19 are "incurable, permanent, or fatal…as opposed to easily curable and fleeting effects on their health." OSHA also discussed that "the advent of vaccines does not eliminate the grave danger…in healthcare workplaces where less 100% of the workforce is fully vaccinated," due to spread among unvaccinated workers, the risk of breakthrough infection among the vaccinated, and vaccine hesitancy among healthcare workers.

In finding a "grave danger" to healthcare personnel, OSHA relied upon "CDC guidance and the best available evidence." The agency went on to state that several tools it had already used for its COVID-19 enforcement efforts were inadequate, including its voluntary guidance for protecting workers. OSHA further referenced the lack of compliance with that voluntary guidance and need for a "more consistent national approach" that "levels the playing field" among all employers.

What Have States and Industry Groups Said?

In response to President Biden's plan, the Attorneys General of 24 states (Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming) penned a September 16 open letter indicating their intent to challenge any vaccine mandate placed on private citizens. In their letter, the Attorneys General laid out their general objections to the rationale of the proposed ETS, as well as their argument that any such standard failed to comply with the OSH Act's requirements.

Their challenge, as stated, would be premised upon three separate arguments:

- that the standard of "grave danger" to employees is not met;
- that COVID-19 is not [illegible]

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

- that COVID-19 is not a substance, agent, or hazard under the Act; and
- grouping employers on the basis of 100 or more employees does not meet the requirement that the standard be necessary to alleviate the danger.

The letter went on to explain that any interpretation that the OSH Act can be read to impute authority on OSHA to mandate vaccines for illnesses existing "in society at large" would violate the Constitution's preservation of States' powers to protect the health and welfare of their citizens.

The 7 Most Likely Legal Arguments to be Used to Attack the ETS

As explained, OSHA faces an uphill battle in meeting the justifications of using the ETS statutes. Here are the seven most likely arguments we expect to be launched and the counterarguments we expect OSHA to use as a shield.

Low Death Rate of COVID-19

To be consistent with the *Florida Peach Growers Association* standard, OSHA must show that contracting COVID-19 results in "incurable, permanent, or fatal consequences" to workers. The Attorneys General and other industry challengers lining up to strike down the ETS may argue that, given the death rate of COVID-19, the data does not support that finding. They will find some support for that argument in OSHA's COVID-19 Healthcare ETS, where OSHA admitted that it did not have the data to conduct its typical risk assessment. The agency also admitted that it could not definitively state the number of healthcare workers that have contracted COVID-19.

Instead, OSHA asserted that such an assessment "is not necessary in this situation" because the "gravity of the danger presented by a disease with acute effects like COVID-19…is made obvious by a straightforward count of deaths and illnesses." You can expect the agency to deploy the same justification when defending the vaccine ETS in the coming weeks and months. It is possible, however, that a Circuit Court analyzing a challenge to an ETS with this rationale would find such an argument unpersuasive.

High Numbers of Non-Serious COVID-19 Cases

Further, OSHA appears to be restricted in that it may only be able to rely upon the sheer number of COVID-19 cases in instances where workers have become gravely ill. This would limit any agency justification based upon a general health benefits of avoiding COVID-19, such as remaining at work, or avoiding symptoms such as fever, headaches, fatigue, loss of taste or smell, or other "fleeting effects" on workers' health.

While OSHA may cite to "long-haul COVID cases" for more permanent or lasting examples of COVID-19 danger, it may run into the same issue it did in the *Color Manufacturers Association* case where the Court said any emergency temporary standard must be supported by evidence that shows more than some possibility that exposure may cause workers to become gravely ill.

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

Limited Time Impact if ETS Implemented

The *Asbestos Information Association* case likewise limits the period of harm that a court can consider when determining the justification of the impending ETS. Any appeals court can only examine the six-month period that the ETS will be in place, which will impede the "benefit" side of the cost-benefit analysis balanced against the expected economic impact of the emergency rule.

Timing of ETS

Timing will also be a major factor to be kept into account when determining the survival odds of the ETS. As we have seen with the peaks and valleys accompanying various waves of COVID-19, OSHA will have a data-based challenge with any declining rates of infections, hospitalizations, and deaths. When President Biden unveiled plans for the ETS in early September, the number of daily COVID-19 cases was at the peak of the Delta-fueled surge. In the intervening month, daily cases have plummeted by a significant degree and appear to be trending downward for the foreseeable future. Of course, we've lived through several such rollercoaster rides and it's hard to predict where we will stand at the time a court is examining this data.

Further, OSHA's lack of a previous general ETS on the subject of COVID-19 in the workplace could provide another basis for the Attorneys General, or other industry groups, to argue that OSHA's delay shows this is not a true "emergency" standard.

General Applicability

Importantly, OSHA's prior ETS on COVID-19 was specific to the healthcare industry. This could leave the general ETS open to collateral attack from general industry groups claiming that the vaccine ETS is too broad and not designed to limit the virus where actually needed.

Arbitrary Size Determination

Similarly, by being directed solely at employers with over 100 employees, industry groups could argue that this potentially "arbitrary" figure does not meet the emergency requirements of the ETS statute. After all, if workers are subject to "grave danger" because of COVID-19, why would someone at a 99-employee business not be deserving of the same protection of a company next door with a 100-employee headcount?

Cost-Benefit Analysis

Finally, as for the cost-benefit analysis, the ETS as currently outlined will be far-reaching, impacting the economic and market conditions of almost every industry. As some industries have seen with their own vaccine requirements, some employees would rather quit their jobs than be required to be vaccinated, resulting in worker shortages (although these fears may be a bit more overblown than many employers believe).

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

Even if a mass exodus of employees does not occur, there will still be a substantial financial impact due to the cost of weekly testing for those employers choosing that route and for those employees with a bona fide religious or health exemption — a burden that will fall to employers.

Where Does This Leave Employers?

Despite the obvious legal hurdles that OSHA's general COVID-19 ETS will face, it would be a mistake for you to assume that you will not be required to comply. Even as you read stories about the lawsuits filed — and even if a circuit court enjoins the ETS nationally — the final word on the ETS will not be heard for some time. A prudent employer should prepare to roll out a mandate or testing regimen, regardless of what you hear. Federal and state OSHA standards regarding COVID-19 are not going away any time soon and are an area that will see rapid changes in both the near and long-term.

Many employers have preemptively adopted their own vaccine requirements, and, so far, none have publicly joined in the call to challenge the proposed ETS. Despite President Biden brushing off criticism of the plan, its future is uncertain, both in its constitutionality and the practicality of its implementation.

If the ETS survives immediate challenges to its enforcement, some companies have requested OSHA allow for 90 days to comply, which would push the effective timeline back to January, at the earliest. Despite that potentially longer timeline, you will need to be vigilant to avoid falling on the wrong side of an OSHA enforcement action.

We will monitor these developments and provide updates as OSHA releases the Emergency Temporary Standard and the legal challenges begin. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our FP Vaccine Subcommittee.

Related People

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

Todd B. Logsdon
Partner
502.561.3971
Email

Travis W. Vance
Regional Managing Partner
704.778.4164
Email

Service Focus

Workplace Safety and Catastrophe Management

Industry Focus

Manufacturing

Trending

COVID-19/Vaccine Resource Center

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.